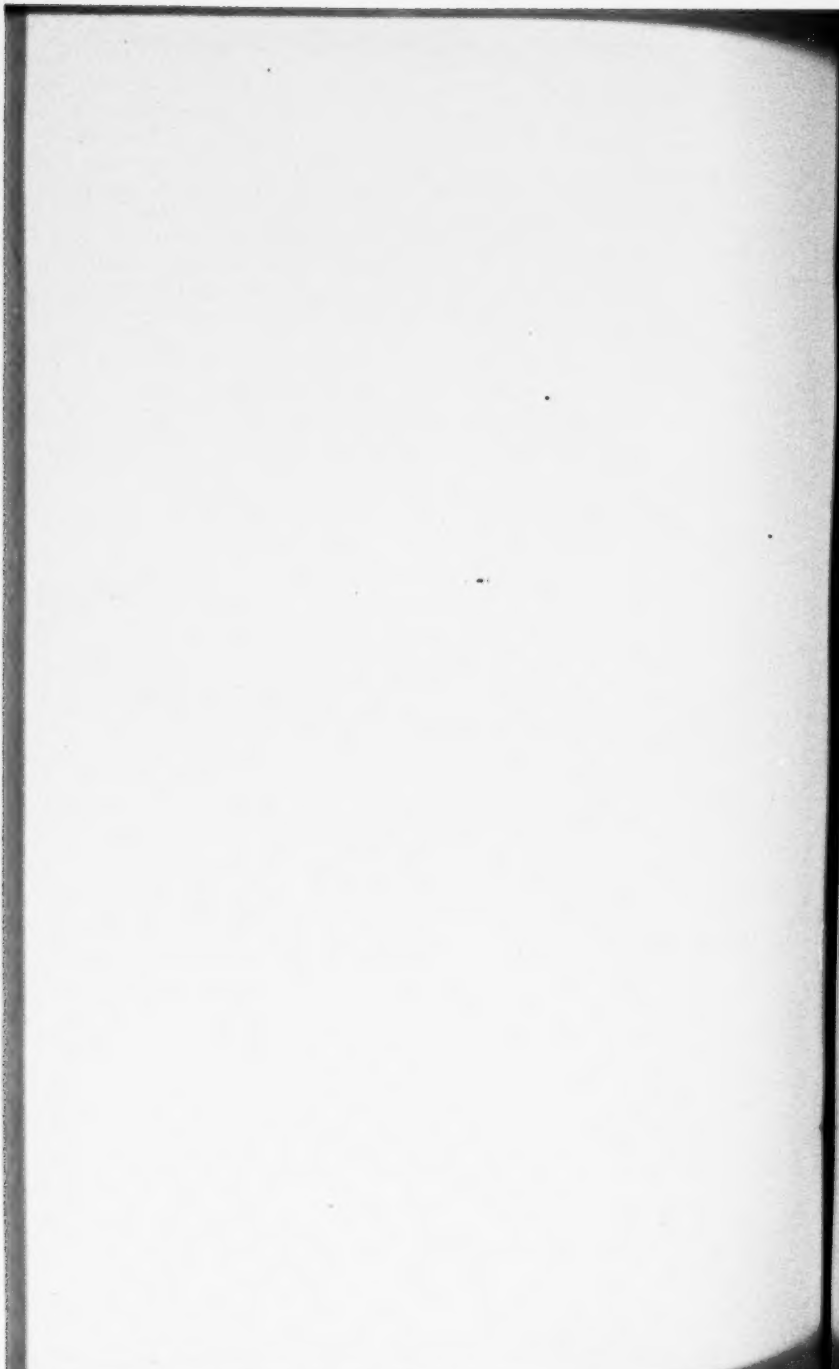

No. 378.

FILED
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JAMES H. McKENNEY,
CLERK

Brf. of Stockbridge & Wardner for Appellant

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Filed Nov. 9, 1901.

No. 378.

LUIGI STORTI, APPELLANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS AND BENJAMIN F. BRIDGES, WARDEN OF THE STATE PRISON AT BOSTON, MASSACHUSETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR APPELLANT.

WILLIAM M. STOCKBRIDGE,
G. PHILIP WARDNER,
Counsel for Appellant.

Supreme Court of the United States.

No. 378. October Term, 1901.

LUIGI STORTI, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS and BENJAMIN F. BRIDGES, Warden of the State Prison, at Boston, Massachusetts.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from an order or decree of the United States Circuit Court for the District of Massachusetts, entered May 24, 1901, dismissing, for want of jurisdiction, a petition for a writ of habeas corpus. The appeal was on May 24, 1901, claimed and disallowed by said court, but was on June 21, 1901, allowed by Mr. Justice Gray of this court. (Record, pp. 30, 36.)

The appeal comes from said Circuit Court to this court by virtue of that provision of section 5 of the Act of March 3, 1891, which authorizes appeals "in any case in which the jurisdiction of the court is in issue."

26 Stats. at L., chap. 517, sect. 5.

The certificate, required by the above act in cases where the jurisdiction of the court is in issue, was made and appears as a part of the record. (Record, p. 36.)

The material facts are as follows: —

On January 4, 1901, the appellant, having been convicted in

the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts, on the last day of its term, to wit, July 1, 1900, of the crime of murder, committed November 7, 1899, was sentenced by said Superior Court to be executed under chapter 326 of the Massachusetts Acts of 1898, the time fixed for the execution being the week beginning April 7, 1901. April 9, 1901, a respite was issued by the governor under Mass. Pub. Stats., chap. 214, sect. 36, which expired May 11, 1901, and, as appears in the petition, "there has been no further lawful pardon, commutation, or respite of sentence by the governor." On April 30, 1901, the appellant filed in the Supreme Judicial Court of Massachusetts a petition for a writ of error to the trial court, and a petition for a writ of habeas corpus, which, on May 7, 1901, were both decided adversely to the appellant, as appears by the opinion of said court, which is made a part of the present record. (Record, p. 28.)

None of the questions involved in the present petition were raised in the last mentioned petitions.

On May 10, 1901, the appellant presented to the United States Circuit Court for the District of Massachusetts a petition for a writ of habeas corpus, which, on May 11, 1901, was on hearing dismissed, and the appellant forthwith took an appeal to this court, which was duly perfected and docketed on May 18, 1901, and appears on the docket of this court as No. 325, but which, in accordance with the agreement of the parties now on file, is to be dismissed when reached for argument. None of the grounds relied upon in the last mentioned petition, to establish the alleged illegal imprisonment, appears in the present petition except one, namely, an illegality in such imprisonment growing out of an alleged violation of treaty rights between this country and Italy.

On May 10, 1901, the appellant also filed in said Superior Court a motion for a new trial under Mass. Pub. Stats., chap. 214, sect. 28, which was assigned for hearing on May 11, 1901, but, by reason of the pendency of the foregoing appeal in said No. 325, was not then heard, and is still pending and undetermined.

The statutes which the appellant deems necessary for consideration are as follows: —

Mass. Stats. of 1898, chap. 326:

"SECT. 1. In pronouncing sentence of death upon a person convicted of a capital crime the court shall appoint a week within which such sentence shall be executed. The clerk of the court shall, as soon as may be, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence, and shall immediately thereafter make out, sign and deliver to the sheriff of the county a warrant, under the seal of the court, stating the conviction and sentence, and the week appointed for the execution thereof, and shall at the same time transmit to the warden of the state prison a certified copy of the warrant. Such warrant shall be directed to the warden of the state prison, commanding the warden to cause execution to be done in accordance with the provisions of such sentence, upon some day within the week thus appointed.

"SECT. 2. When a person is sentenced to the punishment of death he shall be confined in a jail or prison in the county in which such sentence is pronounced until within ten days of the first day of the week appointed for the execution of the sentence. He shall, within such ten days, and at a time chosen by the sheriff of the county, be conveyed as secretly as may be, by the sheriff or such deputy as he may name, to the state prison, where the sentence is to be executed, and be delivered, together with the warrant, to the warden or the officer performing the duties of warden. From the time of such delivery until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the convict under sentence shall be kept in a cell provided for the purpose, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

"SECT. 3. The sentence of death shall be executed by the warden of the state prison, or by a person or persons acting under the direction of the warden. Unless the governor pardons the offence, commutes the punishment therefor, or respites the execution, as provided by law, the execution shall be done within the week appointed by the court; and in case the execution is respited the sentence shall be executed within the week beginning on the day next after the day on which the term of respite expires. The execution shall be done upon such day as the warden shall select within the week determined as aforesaid, and at an hour between midnight and sunrise; but no previous announcement shall be made, except to the persons

who shall be permitted to be present at such execution, as hereinafter provided.

"SECT. 6. The punishment of death shall in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

"SECT. 7. When a warden inflicts the punishment of death upon a convict in obedience to a warrant from the court he shall, as soon as may be, make return thereof under his hand, with the doings thereon, to the office of the clerk of said court.

"SECT. 11. Sections thirty-two, thirty-three, thirty-seven, thirty-eight and thirty-nine of chapter two hundred and fifteen of the Public Statutes are hereby repealed.

"SECT. 12. This act shall take effect upon its passage."

Approved April 13, 1898.

Mass. Pub. Stats., chap. 215:

"SECT. 32. In pronouncing sentence of death upon a person convicted of a capital crime, the court shall appoint the time when such sentence shall be executed. The clerk of the court shall, as soon as may be, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence; and shall immediately thereafter make out and deliver to the sheriff of the county where the conviction was had a warrant under the seal of the court, commanding the sheriff to cause execution to be done in accordance with the provisions of the sentence; and to this warrant there shall be annexed a certified copy of the whole record of the conviction and sentence, and an affidavit of the delivery to the governor of a certified copy of the record required to be delivered as aforesaid.

"SECT. 33. The sheriff shall thereupon cause execution to be done at the time appointed, unless the governor, by and with the advice of the council, pardons the offence, commutes the punishment therefor, or respites the execution of the sentence as hereinafter authorized. In case the execution is respited, the sentence shall be executed on the day next after the day on which the term of respite expires, unless the day next after the day aforesaid is a Sunday or legal holiday; in which case the sentence shall be executed on the first day thereafter which is not a Sunday or legal holiday. In case the sentence is not executed on the day finally appointed, the sheriff shall cause execution to be done as soon as may be after the said day finally appointed.

"SECT. 36. The governor, by and with the advice of the council, may respite from time to time the execution of a sentence of death for stated periods so long as he may deem it necessary to afford him, by and with the advice aforesaid, an opportunity

of exercising the constitutional right of pardon, and of investigating and considering the facts of the case for that purpose."

Mass. Pub. Stats., chap. 214, sect. 28:

"The supreme judicial court and superior court may at the term in which the trial of an indictment is had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on such terms or conditions as the court shall direct."

Extracts from the existing treaty between the United States of America and his Majesty the King of Italy:

"ARTICLE III.

"The citizens of each of the high contracting parties shall receive, in the state and territories of the other, the most constant protection and security for their person and property, and shall enjoy in this respect the same right and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Art. 23, printed at Record, p. 6.

Nine assignments of error are set forth (Record, pp. 30–36). But the sole question involved in the case is whether the Circuit Court erred in ruling that it had no jurisdiction of the cause, as averred in the ninth assignment of error. (Record, p. 36.)

The questions involved in the other assignments are material so far, but only so far, as they affect the question of jurisdiction. They involve, briefly stated, the following questions:

FIRST ASSIGNMENT.

Whether the present restraint of the appellant by the warden of the state prison, for the purpose of inflicting the death penalty, notwithstanding the failure of the laws of the Commonwealth of Massachusetts, legislative or otherwise, to furnish authority for holding the appellant in custody and inflicting the death penalty, where the week fixed for the execution has elapsed without execution having been done, and no lawful

pardon, commutation, or respite has been made, is a denial of the rights given to the appellant by the first section of the Fourteenth Amendment of the Constitution of the United States.

Second Assignment.

Whether such restraint under the last mentioned circumstances is a denial of the rights given to the appellant by the first section of the said Fourteenth Amendment or by the third article of the Italian treaty.

Third Assignment.

Whether, in view of the averment that under Mass. Pub. Stats., chap. 214, sect. 28, a capital sentence cannot lawfully be inflicted within a year from the expiration of the term within which a criminal was convicted, the execution of the sentence imposed upon the appellant, in that if carried out it would deprive him of his right to move for a new trial within such year, would be a denial of any of the rights given to the appellant by said first section of the Fourteenth Amendment of the Constitution of the United States.

Fourth Assignment.

Whether the execution of said sentence, in view of the last mentioned averments, would be a denial of any of the rights given to the appellant by said first section of the Fourteenth Amendment or by the third article of the Italian treaty.

Fifth Assignment.

Whether, in view of the last mentioned averments, the execution of said sentence, in that it would deprive the appellant of his right to be present at a decision on a motion for a new trial, would be a denial of any rights guaranteed to him by article 23 of said Italian treaty.

Sixth Assignment.

Whether the reasonable apprehension of the appellant that the respondent Bridges, as warden of the state prison, intends to inflict the death penalty before the appellant can be heard

upon his pending motion for a new trial, is a denial of any of the appellant's rights, under the first section of the Fourteenth Amendment of the Constitution of the United States or under article 23 of the Italian treaty.

SEVENTH ASSIGNMENT.

Whether the continued holding of the appellant in restraint, notwithstanding the lack of authority on the part of the warden of the state prison, and the failure of the legislature to furnish authority, to hold the appellant in custody after the expiration of the week appointed for execution, and in the absence of any lawful pardon, commutation, or respite, is a denial of any of the rights given to the appellant by said first section of the Fourteenth Amendment of the Constitution of the United States.

EIGHTH ASSIGNMENT.

Whether such continued holding of the appellant is a denial of any of the rights given to him by said first section of the Fourteenth Amendment or by the third article of the Italian treaty.

ARGUMENT.

I.

THE SOLE QUESTION FOR DETERMINATION IS WHETHER THE CIRCUIT COURT HAD JURISDICTION TO ENTERTAIN THE PETITION.

Section 5 of the Act of March 3, 1891, contains three provisions, any one of which would have furnished sufficient authority for an appeal to this court from an adverse decision of the Circuit Court on the present petition. The provisions referred to are those authorizing an appeal (1) "in any case in which the jurisdiction of the court is in issue," and (2) "in any case that involves the construction or application of the Constitution of the United States," and (3) "in any case in which . . . the validity or construction of any treaty made under its authority is drawn in question."

26 Stats., chap. 517, sect. 5.

If the lower court had dismissed the petition on any ground other than want of jurisdiction this court would have acquired jurisdiction of the entire case, and could have considered whether, on grounds of discretion or on any grounds affecting the merits of the controversy, the writ should or should not have issued, and need not have confined itself to the single federal question which was the basis of the appeal.

Horner *v.* United States, 143 U.S. 570, 576, 577.

The ability of the court to take jurisdiction of the entire case was said in Horner *v.* United States, *supra*, to arise from the fact that a certificate was required by the Act in cases where the jurisdiction of the court was in issue, but was not required in the other cases mentioned in section 5, and that, in consequence, the legislature could not have intended, in cases where the jurisdiction of the court was not in issue, to confine the Appellate Court to a determination of the federal question or questions which were made the bases of the appeal. From the above reasoning the inference is overwhelming that where, as in the present case, the jurisdiction of the court is in issue and the question of jurisdiction has been certified to this Court, no other question is open for consideration.

So, also, it was held that, even where the jurisdiction of the lower court was in issue, the absence of a certificate enabled the court to dispose of "the entire case, including all questions, whether of jurisdiction or of merits."

Chappell *v.* United States, 160 U.S. 499, 509.

In Press Publishing Co. *v.* Munroe, 164 U.S. 105, 110, Mr. Justice Gray says:

"From final judgments of the Circuit Court in civil suits an appeal or writ of error lies to this court or to the Circuit Court of Appeals. It lies direct to this court in any case in which the jurisdiction of the Circuit Court is in issue; and in such case the question of jurisdiction *only* is certified to *and decided by this court*."

Where a case has been dismissed in the Circuit Court for want of jurisdiction, and the certificate required by section 5 in such cases had been made, this court refused to consider anything but the question of jurisdiction; and, being satisfied that the lower court had erred in dismissing the case for want of jurisdiction, remanded the cause for further proceedings, although it was apparent that the action could not be maintained on the merits because it was already *res adjudicata*, which question the court below had treated as a question of jurisdiction.

Huntington *v.* Laidley, 176 U.S. 668.

The requirement as to a certificate is satisfied by "a plain declaration that the single matter which is by the record sent up to this court is a question of jurisdiction."

Shields *v.* Coleman, 157 U.S. 168, 176.

II.

THE CIRCUIT COURT HAS JURISDICTION UNDER THE REVISED STATUTES OF A PETITION FOR HABEAS CORPUS BY A PRISONER IN JAIL WHERE IT IS DEDUCIBLE FROM THE RECORD THAT IT IS DRAWN IN QUESTION OR CLAIMED THAT SUCH IMPRISONMENT IS IN VIOLATION OF THE CONSTITUTION OR A LAW OR TREATY OF THE UNITED STATES.

The learned judge of the court below, in dismissing the case for want of jurisdiction, uses the following language:

"Now, this petition is very general in its allegations. It isn't enough, in order to require this court to issue a writ of habeas corpus, that the petition alleges that the prisoner is held in violation of the Constitution of the United States, or of a treaty with a foreign nation, as was said in King's case (64 Fed. Rep. 331). . . . In the present case the allegations of the petition are not very full in this particular, but still they are sufficient, together with the exhibits annexed to the petition, to enable us to determine whether or not there is anything in the petition which brings the case within the section of the Revised Statutes from which we have read (sect. 753); that is, whether or not there is enough to support the allegation that the petitioner is in

custody in violation of the Constitution or of a law or treaty of the United States. Admitting that he is in jail, and in jail under some authority of somebody representing the state of Massachusetts, we cannot issue the writ unless we find, on the face of the petition, something which meets the express provision of the section which we have read. That question lies at the very threshold of our proceeding. It is a settled rule that a federal court must take cognizance of the question of jurisdiction; and where it is clear that it has no jurisdiction it must dismiss the case, even if the suggestion is not made by the parties concerned."

Re Storti, 109 Fed. Rep. 807, 808.

From the above language it is apparent that the learned judge, in dismissing the petition for want of jurisdiction, was of the opinion that unless the petition showed so conclusively a custody in violation of the Constitution or a law or a treaty of the United States as would require him, on proof of the facts alleged after the issue of and return to a writ of habeas corpus, to discharge the prisoner, he could not take jurisdiction of the cause. It is the contention of the appellant that jurisdiction depends not on the determination by inspection of the petition that the petitioner is, as a matter of law and fact, in custody in violation of the Constitution or a law or treaty of the United States, but on the determination by such inspection that a colorable, not necessarily a well founded, claim is made that he is so in custody; in other words, that the court has jurisdiction to determine whether the writ shall issue, that is, has jurisdiction of the cause, if it is distinctly deducible from the record that a definite issue is presented to the court as to whether the petitioner is in custody in violation of the Constitution or a law or treaty of the United States, regardless of the decision of the court on such issue.

It is elementary that the question of jurisdiction is entirely distinct from a determination of the cause upon its merits.

Nashville, etc., R. Co. *v.* Taylor, 86 Fed. Rep. 168, 178, and cases cited.

And it is further submitted that the learned judge failed to recognize the above distinction.

The correctness of the appellant's contention can be seen:

(1) By an examination of the statutes conferring upon federal courts jurisdiction to issue writs of habeas corpus.

(2) From the language of and construction placed upon analogous statutes.

(3) From the mischievous results of a different contention.

(4) From a consideration of the procedure sanctioned and recommended by this court in dealing with applications for writs of habeas corpus.

1. The earliest statute conferring habeas corpus jurisdiction is the fourteenth section of the judiciary act of 1789 (1 Stats. 81, chap. 20). This gave the federal courts jurisdiction "in all cases to which the judicial power of the United States extends other than those expressly excepted from it."

Ex parte Yerger, 8 Wall. 85, 101.

The cases so excepted were those of prisoners in jail "unless where they are in custody under *or by color of* the authority of the United States."

Under this statute the court, though entertaining a doubt, "in favor of liberty, was willing to grant the habeas corpus."

Ex parte Burford, 3 Cranch, 448.

The next statute was the Act of March 2, 1833 (4 Stats. 632, chap. 57), section 7 of which extended the jurisdiction over a prisoner or prisoners in jail "where he or they shall be committed or confined, on or by any authority of law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof."

Next, the Act of August 29, 1842 (5 Stats. 539, chap. 257), still further extended the jurisdiction over prisoners in jail "where he, she, or they, being subjects or citizens of a foreign state and domiciled therein, shall be committed or confined or in custody under or by any authority of law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any *alleged* right, title,

authority, privilege, protection, or exemption, *set up or claimed* under the commission, or order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations *or under color thereof*."

Finally, the Act of February 5, 1867 (14 Stats., 385, chap. 21), broadly extended the jurisdiction of the federal courts over prisoners in jail "in all cases where any person *may be* (not "is") restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States."

The provisions of the foregoing statutes were consolidated and appear in Rev. Stats., chap. 13, sects. 751–766.

It was not the intention in so consolidating the statutes to alter in any respect the previously existing jurisdiction. (See Report of Commissioners on Revision, v. 1, sect. 218, note.) And it has been determined that section 753 of the Revised Statutes in providing that the writ of habeas corpus would in no case be extended to a prisoner in jail, "unless . . . he . . . is in custody in violation of the Constitution or of a law or treaty of the United States," has by necessary implication affirmatively enacted that the writ shall issue, even in the case of a prisoner in jail, if he is in custody in violation of the Constitution or of a law or treaty of the United States.

Ex parte Royall, 117 U.S. 241, 247.
In re Neagle, 135 U.S. 1, 40, 41, 70.
In re Burrus, 136 U.S. 586, 591.

In fact, the Act of February 5, 1867, was in the affirmative form.

In two of the statutes, fourteenth section of the judiciary act and the Act of August 29, 1842, jurisdiction is clearly dependent not on the fact, in the one, that the prisoner is in custody under the authority of the United States, or on the fact, in the other, that his "right, title, authority, privilege, protection, or exemption" are well founded, either in fact or in law, but upon the circumstance that a *claim* appears to be made that he is so in custody. The language used by the commissioners and adopted by Congress in the revision, and contained in that part of section

753 which furnishes the authority for jurisdiction in the present case, is different from the Act of February 5, 1867, by which jurisdiction in cases of persons imprisoned in violation of the Constitution or of a law or treaty of the United States is established; but, as above shown, there was no intention to alter in section 753 the previously established jurisdiction, so that the words in section 753 "is in custody in violation of the Constitution or of a law or treaty of the United States" must be construed as if they read "*may be* in custody, etc." Such construction, and it is submitted to be the necessary construction, substantiates the appellant's contention that the existence of a claim, not its validity in law or fact, determines jurisdiction, and brings the prerequisites of jurisdiction, as given by the Act of February 5, 1867, in harmony with all the prior statutes, excepting possibly the Act of March 2, 1833.

It is significant, and further confirmatory of the appellant's contention, that in no case has this court held or declared that any different considerations prevailed, with reference to the assertion on the one hand or the establishment on the other of the claim of unlawful imprisonment in the Acts of March 2, 1833, and February 5, 1867, than prevailed by express language in the fourteenth section of the judiciary act and in the Act of August 29, 1842.

None of the statutes passed since the adoption of the Revised Statutes, relating specifically to the jurisdiction of the circuit courts and involving money values as a condition of such jurisdiction, including the Act of March 3, 1875, chap. 137 (18 Stats. 470), and that of March 3, 1887, as re-enacted by the Act of August 13, 1888, chap. 866 (25 Stats. 433), has taken from said courts their jurisdiction to issue writs of habeas corpus under section 753, in the case of a prisoner in jail, where he is in custody in violation of the Constitution or a law or treaty of the United States.

United States *v.* Mooney, 116 U.S. 104.
In re Hohorst, 150 U.S. 653.
King *v.* McLean Asylum, 64 Fed. Rep. 331.
(C. C. A. First Circuit, 1894.)

2. The above contention is further strengthened by the consideration of the language and the construction placed thereon of analogous statutes.

It has been uniformly held under Revised Statutes, section 709, that this court has jurisdiction of an appeal from or writ of error to the highest court of a state, the judgment or decree of which is contended to have been against the validity of a treaty or statute of or an authority exercised under the United States; or to have been in favor of the validity of a statute of or authority exercised under a state challenged for repugnancy to the Constitution, laws, or treaties of the United States; or to have been against a right, title, privilege, or immunity claimed under the Constitution, or any treaty, statute of, commission held, or authority exercised under the United States, *if it appears that the right was specifically set up and claimed* in the state court and was denied, or that that was in law the necessary effect of the decree or judgment.

This court furthermore, in such cases, has repeatedly sustained its jurisdiction, when that question has been raised by motion to dismiss or otherwise, and has nevertheless affirmed the decision of the state court, showing conclusively the distinction between the question of jurisdiction and the determination of the cause upon its merits.

In Insurance Co. *v.* Needles, 113 U.S. 574, 579, Mr. Justice Harlan said:

"And our jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must therefore be denied."

See also

Willson *v.* Blackbird Creek Marsh Co., 2 Pet. 245.
Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 143.
Lehigh Water Co. *v.* Easton, 121 U.S. 388, 389.
Kaukanna Co. *v.* Green Bay, etc., Canal, 142 U.S. 254, 262, 271.
Roby *v.* Colehour, 146 U.S. 153.
C. B. & Q. R. Co. *v.* Haber, 169 U. S. 613, 622.

It is true that the language of section 709 is perhaps more favorable to the contention here advanced than the language of section 753, section 709 providing that the decision of the state court may be re-examined by this court where *is drawn in question* the validity of a treaty, etc., of the United States, or where any title, etc., *is claimed*, etc., under the Constitution, etc.

But the decisions show clearly that the principles governing cases arising under section 709 do not necessarily turn on its specific language. Moreover, while the language of section 709 is broad enough to cover any case, however flimsy, nevertheless this court has held that it had no jurisdiction under section 709 if the claim was fraudulent or frivolous.

Millingar *v.* Hartupee, 6 Wall. 258.
New Orleans *v.* New Orleans Waterworks Co., 142 U.S. 79, 87.
Hamblin *v.* Land Co., 147 U.S. 531.

It would seem no more difficult to read into section 753, the language of which, as set forth in the section, swings perhaps to an extreme in the other direction, the qualification that the court would have jurisdiction of any petition for habeas corpus by a prisoner in jail, where it was drawn in question, or claimed that his custody was in violation of the Constitution or of a law or treaty of the United States, there being, of course, the same qualification as to fraudulent or frivolous claims.

The decisions of this court under section 5 of the Court of Appeals Act (Act of March 3, 1891, chap. 517, 26 Stats. 826) are perhaps even more apposite.

It is provided by said section "that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases. . . .

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.

"In any case in which the constitution or law of a state is claimed to be in contravention of the United States."

Thus, in the case of an appeal from the Circuit Court for the Northern District of Illinois to this court under the first of the above-quoted clauses of said section 5, it was said by Mr. Justice Gray:

"In order to bring a case within this clause of the act, the Circuit Court must have construed the Constitution or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for."

Cornell *v.* Green, 163 U.S. 75, 78.

In a dissenting opinion in the same case, Mr. Justice Brown said, at page 86:

"The bill averred broadly that he was not made a party at all, but the court, putting its own construction upon the foreclosure proceedings, which were made an exhibit to the original bill, decided that he was. Whether he was bound individually by the proceedings against him in his representative capacity — in other words, whether he individually was a party defendant to the bill — is beside the question. It is sufficient that he is averred not to have been, that a construction of the Constitution was necessarily involved, and that the position of the plaintiff in that connection is not a frivolous one or wholly destitute of foundation."

See also

Tennessee *v.* Union & Planters Bank, 152 U.S. 454, 458.
Ansbro *v.* U. S., 159 U.S. 695.
Insurance Co. *v.* Austin, 168 U.S. 165.

A similar doctrine has been laid down in determining whether circuit courts have jurisdiction of suits originally brought therein or removed thereto from state courts, on the ground that the proceedings were suits of a civil nature, at law or in equity, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," as provided in the Act of March 3, 1875, chap. 137 (18 Stats. 470), and the Act of March 3, 1887, chap. 373 (24 Stats. 552), as corrected by the Act of August 13, 1888 (25 Stats. 434).

Thus, it was said by Mr. Justice Gray in Tennessee *v.* Union & Planters Bank, 152 U.S. 454, at page 459, that "under section 1 of that act (March 3, 1875), providing that those courts (circuit courts) should have original cognizance of such suits, when the matter in dispute exceeded the sum or value of five hundred dollars, their jurisdiction was exercised in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the Constitution or laws of the United States."

The learned justice further said that under section 2 of the Act of 1875 a case might be removed from a state to a federal court as one arising under the Constitution, laws, or treaties of the United States, if the record at the time of the removal showed that either party *claimed* a right under the Constitution or laws of the United States.

See also cases cited at pp. 459 and 460.

In City R. Co. *v.* Citizens St. R. Co., 166 U.S. 557, in which the question was raised in the pleadings as to whether the Citizens Railroad Company had a valid contract with the city of Indianapolis, which was impaired by a subsequent contract with the City Railway Company, Mr. Justice Brown, delivering the opinion of the court, said: "All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

See also

Spencer *v.* Merchant, 125 U.S. 345.
Hamilton Gas Light & Coke Co. *v.* Hamilton City, 146 U.S. 258.
Cooke *v.* Avery, 147 U.S. 384.
Hanford *v.* Davis, 163 U.S. 273.

The appellant's contention may be summed up in the language of Judge Clark in the case of Nashville, etc., R. Co. *v.* Taylor, 86 Fed. Rep. 168 (Circuit Court for the Middle District of Tennessee, 1898), at p. 178, where it is said:

"It will be well, before dealing more closely with the question of jurisdiction here raised, to note the clear distinction between

the existence of a federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether there is a claim which presents the federal question, and whether that claim is well founded when considered on its merits, are distinct and different questions. The one goes to jurisdiction, and the other to the merits of the case."

See also, *In re* Lennon, 150 U.S. 393, 400.

3. Unless the appellant's contention is correct, the circuit court would never have jurisdiction of a petition for habeas corpus, under that part of section 753 now under consideration, where at any stage of the case it should be of opinion that the petitioner was not in custody in violation of the Constitution or of a law or treaty of the United States, and a decision adverse to the petitioner would always be equivalent to a decision that the court had no jurisdiction, and no costs would in such case be taxable against the petitioner.

Mayor, etc., *v.* Cooper, 6 Wall. 247.

A person applying, therefore, for a writ of habeas corpus need never be deterred from so applying, because, unless the appellant's contention is correct, he could never be subjected to costs if he failed to establish his case, and the deterrent effect, which the law ascribes to liability to costs, in case of failure, would have no significance.

4. Prior to the Act of February 5, 1867, there was no statute regulating the matter of procedure when a petition for a writ of habeas corpus was presented, and the court followed in this respect the practice of common law.

See Report of Commissioners on Revision, sect. 227, note.

Under this practice the function of the application or petition was not to determine whether upon the facts alleged the petitioner should be discharged from custody, but whether the facts alleged showed "sufficient probable cause" for such discharge.

Sims's case, 7 Cush. 285, 291, and cases cited.

Rev. Stats., sect. 755, provides that:

"The court, or justice, or judge, to whom such application is made shall forthwith award the writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto."

This section is merely confirmatory of the practice previously prevailing. Thus in Watkins' case, 3 Pet. 201, Marshall, C.J., said: "The writ ought not to be awarded if the court is satisfied that the prisoner would be remanded."

It will be noticed that nothing in the language of sect. 755 directly forbids the court to issue the writ, even if "it appears from the petition itself that the party is not entitled thereto"; in other words, when the petition is presented, the court may elect which of two courses of procedure it will adopt; either at once to deny the prayer of the petition, because the court is of opinion that it does not set forth a case entitling the petitioner to the relief prayed for, or to issue the writ and determine, after a final hearing, whether the prisoner shall be remanded or discharged or otherwise disposed of, as law and justice require.

Rev. Stats., sect. 761.

In *Ex parte* Burrus, 133 U.S. 586, 591, Mr. Justice Harlan, after saying that "it should be made to appear upon the application for the writ that it is founded upon some matter which justifies the exercise of federal authority," uses this language:

"It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction, because, when the petition is brought before the court, or justice, or judge, his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued, and it is *upon such hearing* to be finally determined whether his imprisonment or custody is in violation of the Constitution or laws or treaties of the United States."

But if, as the opinion of the learned judge in the court below would seem to indicate, a determination that the prisoner is in custody in violation of the Constitution or of a law or treaty of the United States is a prerequisite of jurisdiction, then it follows

that the court must in every instance determine such question at the outset, however difficult such determination may be, for, as was said by Chief Justice Marshall in Cohen *v.* Virginia, 6 Wheat. 264, 404:

"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

Therefore, if the determination that the prisoner is in custody in violation of the Constitution or of a law or treaty of the United States is a prerequisite to jurisdiction, the language of Mr. Justice Harlan above quoted, in *Ex parte* Burrus, that "the court or judge who is asked to issue such writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction," is meaningless.

In *Ex parte* Terry, 128 U.S. 289, 301, Mr. Justice Harlan, in discussing the subject, says: —

"Its general duty in such cases is also prescribed by statute . . . (Rev. Stats. 754, 755). The writ *need not* therefore be awarded, if it appear upon the showing made by the petitioner that if brought into court and the cause of his commitment inquired into he would be remanded to prison."

If it was obligatory, and not discretionary, to refuse the writ where the court was of opinion that the prisoner was not in custody in violation of the Constitution or of a law or treaty of the United States, and if, therefore, it was the peremptory duty of the court to refuse the writ in such case, it is submitted that this court would have said not that the writ "*need not* be awarded," but that the writ *must not* be awarded.

The strength of the above contention is further shown by the fact that an examination of numerous cases where the issue of the writ was denied, because it appeared from the petition itself that the party was not entitled thereto, fails to disclose a single instance in which the denial of the petition was placed upon the ground that the court had no jurisdiction to issue the writ.

In view of the foregoing authorities it is submitted that the learned justice in the lower court, even if he was satisfied that the facts alleged in the petition would not justify the issuing of the writ, might, nevertheless, in his discretion have ordered the writ to issue, and have disposed of the case after a return had been made to the writ, and after a "full inquiry into the cause of commitment or detention."

Ex parte Burrus, *supra*.

And if such discretion existed, it plainly follows that, on whatever other ground he might refuse to issue the writ, he could not so refuse on the ground of want of jurisdiction.

III.

The Questions Presented by the Present Petition are not Fraudulent, Fictitious, or Frivolous.

It has been said that the general doctrine giving jurisdiction where a claim is made involving the construction of the Constitution of the United States or a treaty of the United States is subject to the qualification that such claim must not appear to be fraudulent, fictitious, or frivolous. Thus in Southern Pac. R. Co. *v.* Cal., 118 U.S. 112, Mr. Chief Justice Waite says:

"The right of removal does not depend upon the validity of the claim set up under the constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit."

So in Insurance Co. *v.* Austin, 168 U.S. 695, Mr. Justice White says:

"Of course the claim must be real and colorable, not fictitious and fraudulent."

No direct adjudication turning upon this qualification in cases of habeas corpus has come to the attention of counsel, unless the decision of the learned justice in the court below is to be so regarded. Assuming that the qualification exists, the appellant contends that it has no application to the present case. The learned justice in his opinion dismissing the petition for want of jurisdiction based such dismissal upon three grounds:

1. Because the petition failed to show that the legislature of Massachusetts had omitted to do its duty, and that the alleged apprehended injury would arise, not from any failure of the legislature, but from the alleged misconduct of the warden of the state prison, and it was said that "the Fourteenth Amendment does not apply where the legislature has done its duty, and where the fault is incidental, either with the courts or with the officials."

2. Because the petitioner failed to allege that the appellant, being a subject of the king of Italy, was not enjoying, as provided by article 3 of the Italian treaty, the same privileges and rights in legal proceedings which are enjoyed by the natives of this country.

3. Because the question arising under the twenty-third article of said treaty was at the time pending in this court on appeal.

An allusion was made to the circumstance that under the decision in Minnesota *v.* Brundage, 180 U.S. 499, the appellant should have exhausted his remedies in the state court before applying to the federal court, but such failure to exhaust state remedies was explicitly declared not to be the ground upon which the judgment in fact rested, and was a subject appealing to the discretion of the court, and not a jurisdictional defect, as was directly held in the last mentioned case.

It is respectfully submitted that none of the reasons assigned by the learned justice bring the case within the above qualification.

1. The operation of the Fourteenth Amendment is not confined, as asserted in the opinion of the learned justice, to cases where the legislature has not done its duty, but has been repeatedly held by this and other federal courts to cover cases where, as in the present case, a person was in danger of being deprived of his life or liberty or property through the unlawful

action of the instrumentalities of the state, either legislative, executive, or judicial, or by any person acting by virtue of public position under a state government, and enabled by reason of his position so to act.

C. B. & Q. R. Co. *v.* Chicago, 166 U.S. 226, 233.
Ex parte Virginia, 100 U.S. 339.
United States *v.* Ryan, 109 U.S. 3.
Scott *v.* McNeil, 154 U.S. 34.
Smoot *v.* Ky. Central R.R. Co., 13 Fed. Rep. 337.
Nashville, etc., R.R. Co. *v.* Taylor, 86 Fed. Rep. 168.
Ex parte Ulrich, 42 Fed. Rep. 587.
In re Kelley, 46 Fed. Rep. 653.
In re Friedrich, 51 Fed. Rep. 747.

In C. B. & Q. R. Co. *v.* Chicago, *supra*, Mr. Justice Harlan says, at p. 233:

"But it must be observed that the prohibitions of the amendment (Fourteenth Amendment) refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'"

It is unnecessary for the appellant, in a discussion of the question of jurisdiction, to reconcile the above authorities with the decision in Arrowsmith *v.* Harmoning, 118 U.S. 194, cited by the learned judge in his opinion, and the line of cases following Arrowsmith *v.* Harmoning, if indeed any conflict can be said to exist between the two lines of cases. The very existence of conflicting decisions conclusively shows that a claim in accordance with one of the lines can, in no proper sense, be said to be a fraudulent, fictitious, or frivolous claim. It is submitted, however, that Arrowsmith *v.* Harmoning, and kindred cases, are reconcilable with the above line of cases, upon which the appellant relies, by holding that "due process of law," *ex vi termini*, is with reference to state legislation what the judicial branch has

declared it to be, subject, of course, to limitations not yet accurately defined; but that the action of the executive and legislative branches cannot be said to determine what is due "process of law," at least in the absence of direct judicial action upon the particular case or cases similar to the one actually before the court. It cannot be asserted in the present case that the judicial branch of the state government has ever decided, or ever had an opportunity to decide, adversely to the appellant's main contention, namely, that the respondent, as warden of the state prison, has been given no authority in law to inflict the death penalty or to retain custody of the convict where the week appointed for execution has elapsed without execution having been done, and where there has been no lawful action in the way of pardon, commutation, or respite of sentence.

Furthermore, in view of the circumstance that Arrowsmith *v.* Harmoning was cited as establishing want of jurisdiction, it should be observed that in the last-mentioned case the court expressly declined to dismiss for want of jurisdiction, saying, "The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus *we probably have technical jurisdiction*. For this reason the motion to dismiss must be denied, but the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument."

Furthermore, the appellant's contention that the law of Massachusetts furnishes no authority in law to the respondent, as warden of the state prison, to inflict the death penalty or to retain custody of the convict where the week appointed for execution has elapsed without execution having been done, and where there has been no lawful action in the way of pardon, commutation, or respite of sentence, is supported by the statutes and decisions of Massachusetts.

At common law the court merely directed that the sentence of death should be inflicted, and the time and place of execution and the custody of the prisoner in the meantime were entirely in the discretion of the sheriff.

Ex parte Medley, 134 U.S. 160.
Costley *v.* Commonwealth, 118 Mass. 1, 35.

In 1777 the legislature of Massachusetts enacted that no person should be put to death on whom the sentence of death should be passed before the whole record of the case should be certified by the clerk of the court to the supreme executive authority of the state, nor until a warrant should be issued by said supreme executive authority directed to the sheriff of the county in which the trial was had, commanding him to cause execution to be done according to the judgment.

Stat. 1777, chap. 32, sect. 24.

This statute remained in force until 1876, and before and since the adoption of the Constitution of Massachusetts the court never fixed the time of execution of a sentence of death, but always left it to the determination of the executive.

Costley *v.* Commonwealth, *supra*.

In 1876 the legislature enacted a statute (Stats. 1876, chap. 166) which is found in Mass. Pub. Stats., chap. 214, sects. 32, 33, 34, and 35, the material parts of which statute, to wit, sects. 32 and 33, are set out at length on page 4 of the present brief. This statute purported to regulate the subjects of judgment in capital cases and the infliction of the death penalty and the custody of the prisoner between judgment and execution, and expressly repealed the previous statutes relating to those matters. Sect. 2 of the last mentioned Act, which is sect. 33 of chap. 215 of Pub. Stats., provided that "in case the sentence is not executed on the day finally appointed the sheriff shall cause execution to be done as soon as may be after the said day finally appointed."

The statute of 1876, chap. 166, continued in force until the enactment of the statute of 1898, chap. 326, under which the petitioner was sentenced, and to which alone reference must be made for the respondent's authority either to hold the petitioner in custody or to inflict the death penalty. It is elementary that no authority existed in the warden of a state prison at common law, and it therefore follows that his authority, being in derogation of the common law, must be strictly construed.

Stats. 1898, chap. 326, sect. 11, repeals sect. 32 of the Mass. Pub. Stats., and fails to give any authority to the warden of the state prison, after the expiration of the week within which execution was appointed to be done without execution having been done, and in the absence of any lawful pardon, commutation, or respite of sentence, either to hold the petitioner in custody or to inflict the death penalty, and therefore the respondent is holding the appellant in custody without authority at the present time and he is entitled to be discharged.

2. The learned judge failed to find any allegation that a discrimination had been made between the appellant, a subject of the king of Italy, and natives of this country. It is submitted that such discrimination is set forth in the second, sixth, and eighth assignments, the purport of which was that the respondent, contrary to law, — that is, contrary to what he is under obligation to do, and to what, therefore, he presumably would do in the case of other persons, — is holding the appellant in custody and proposing to inflict the death penalty. If an American citizen was about to be put to death by an executive officer of the Italian government, acting under color of his office but contrary to the law of Italy, it seems evident that such unwarranted action would be treated as a violation of treaty rights.

3. The third reason assigned by the learned judge for his denial of jurisdiction is the pendency of an appeal in which the interpretation of the twenty-third article of the Italian treaty was among other questions involved. Whatever effect such pendency might have in justifying a refusal to consider the question then pending, or to postpone a decision thereon until it had been passed upon by this court, such pendency cannot, it is respectfully submitted, have any bearing upon the power of the court to take jurisdiction.

Respectfully submitted,

WILLIAM M. STOCKBRIDGE,
G. PHILIP WARDNER,
Counsel for Appellant.